

1994

Shirley Carrier v. Pro-Tech Restoration : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 940550-CA

IN THE UTAH COURT OF APPEALS

SHIRLEY CARRIER,

Plaintiff/Appellant,

vs.

PRO-TECH RESTORATION dba STONE
CARPETS, WILLIAM ROGER SMITH, and
THE CITY OF PLEASANT GROVE,

Defendants/Appellees.

PETITION FOR REHEARING

Case No. 940550-CA

(Priority 15)

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF
UTAH COUNTY, STATE OF UTAH
HONORABLE RAY M. HARDING, DISTRICT JUDGE, PRESIDING

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COURT OF APPEALS

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To the Honorable Judges of the Utah Court of Appeals:

Pursuant to the provisions of Rule 35 of the Utah Rules of Appellate Procedure, Pro-Tech Restoration dba Stone Carpets (hereinafter "Pro-Tech"), the above-named appellee, respectfully petitions the court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this Petition, appellee represents to the court as follows:

PROCEDURAL BACKGROUND

A. Prior to trial, plaintiff filed a motion to limit the number of defendants' peremptory challenges. The court denied plaintiff's motion, finding diverse interests between the defendants, allowing plaintiff and each defendant three peremptory challenges to the main panel and each party one peremptory challenge as to the alternate juror.

B. Following an adverse jury decision, on September 1, 1993, plaintiff filed a Motion for Judgment Notwithstanding the Verdict (Rule 50) and Motion for New Trial (Rule 59). In her memorandum in support, plaintiff *did not* assert as a basis for a new trial that the trial judge had erred in granting each defendant separate peremptory challenges nor the denial of her Motion to Limit Defendants' Peremptory Challenges.

Plaintiff also filed a reply memorandum in support of her motion on September 30, 1993, and again did not raise the issue regarding peremptory challenges.

On October 29, 1993, the court entered its Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial based on the issues raised in plaintiff's motion.

C. On November 12, 1993, plaintiff subsequently filed a Motion for Relief from Order Denying Plaintiff's Motion for New Trial pursuant to Rule 60(b). The memorandum filed in support of plaintiff's motion failed to acknowledge that the Motion NOV and for New Trial had not included a claim regarding peremptory challenges. Instead, as if attempting to amend her failed Rule 59 motion, plaintiff cited Rule 60(b) of the Utah Rules of Civil Procedure and for the first time noted Randle v. Allen, 862 P.2d 1332 (Utah 1993), arguing that the district court's original denial of plaintiffs' Motion to Limit the Defendants' Peremptory Challenges was incorrect.

D. On November 24, 1993, after considering the Randle decision and respective memoranda and oral argument, the trial court denied plaintiff's Rule 60(b) motion. (See, Order attached hereto as Exhibit "A," R. 1036.2-1036.3.) The district court stated, orally and in its order, that it had found at the time of qualifying the jury that there was sufficient adversity between the defendants to justify granting each defendant separate peremptory challenges.

The Court of Appeals failed to address the issue that the plaintiff's assertion of claimed error of the trial court was not timely raised under Rule 59 and that a motion under Rule 60(b) does not extend the time for appeal. See, Goddard v. Bundy, 241 P.2d 462 (Utah 1952).

The court has overlooked or misapprehended the following points of law and/or fact:

POINT I

STANDARD OF REVIEW

The Court of Appeals' failure to address the procedural background caused it to incorrectly apply the standard of review. Instead of noting that "the trial court is afforded broad discretion in ruling on a motion for relief from judgment under Utah R.Civ.P. 60(b), and its determination will not be disturbed absent an abuse of discretion," Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989), the court cites that "this appeal turns on the interpretation of Rule 47 of the Utah Rules of Civil Procedure and, thus, presents a question of law." See, Slip Opinion at 3.

The recitation and application of the accurate standard of review is "central to the decision making of appellate courts (in that standards of review) set the power of the lens through which appellate judges examine each issue." Norman H. Jackson, Utah Standards of Appellate Review, Utah Bar Journal, October 1994, at 11. Whereas the Court of Appeals afforded the trial judge's rulings on plaintiff's Rule 59 and 60 motions "no deference," the correct standard of review of matters committed to the trial court's discretion is set forth in State v. Pena, 869 P.2d 932 (Utah 1994). In employing a pasture metaphor to characterize the spectrum of discretion granted to the trial court, the Utah Supreme Court explained,

Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the

pasture previously available does the trial judge's decision exceed the broad discretion granted.

Id., at 938.

POINT II

THE ISSUE OF PEREMPTORY CHALLENGES WAS NOT TIMELY RAISED

Following the denial of plaintiff's Rule 59 motion, plaintiff subsequently filed **a Motion** for Relief from the Order Denying the Motion for a New Trial under Rule 60(b) asserting as grounds therefor "a recent development and the law, specifically the Utah Supreme Court's ruling in Randle v. Allen."

The plaintiff did not assert the issue of peremptory challenges in her Rule 59 motion. **She** cannot under the guise of Rule 60(b) extend the time for asking for a new trial based on peremptory challenges.

The motion for relief from the order **denying her** motion for a new trial cannot be based on grounds not asserted in the motion for new trial or NOV, which was not presented to the trial court in the timely filed motion.

The Rule 60(b) motion **asked** the trial court for relief from an order upon grounds not presented to the court in the original motion.

Although the Rules of Procedure are to "be **liberally construed** to secure the just . . . determination of every action," Utah Rule of Civil Procedure 1, a court "may not extend the time for taking any action under Rules . . . 59(b) . . . (and) . . . 60(b). . . except to **the extent**

and under the conditions stated in them." Utah Rule of Civil Procedure 6(b). Hence, although a trial court has broad discretion in granting new trials, "its power is not without limitation and cannot be exercised capriciously or arbitrarily" and its actions must conform to established rules and procedures in Utah courts. Kettner v. Snow, 13 Utah 2d 382, 384 (1962).

Rule 59(b) provides that "a motion for new trial shall be served not later than ten days after the entry of judgment." Although Rule 60(b) permits "a reasonable time" in which to make a motion for relief from judgment, when "an untimely motion is made, the trial court's only alternative is to deny the motion." Burgers v. Maiben, 652 P.2d 1320, 1321 (Utah 1982). The issue of what constitutes a reasonable time under Rule 60(b) is reserved to the trial court. As noted previously, this court recognizes that "the trial court is afforded broad discretion in ruling on a motion for relief from judgment under Utah R.Civ.P. 60(b), and its determination will not be disturbed absent an abuse of discretion." Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989) (citations omitted).

The trial court's decision to deny plaintiff's Rule 60(b) motion is consistent with precedent which establishes that Rule 60(b) may not be used to extend the time in which a motion may be filed pursuant to Rule 59. Goddard v. Bundy, 121 Utah 299, 310, 241 P.2d 462 (1952).

Deference to the trial court's judgment is particularly appropriate in this instance. Plaintiff first raised the issue of peremptory challenges in a pretrial motion to limit the number of peremptory challenges given each defendant and should have raised it in the Rule 59 motion

for a new trial if intending to rely upon it. Plaintiff may not avoid compliance with the Utah Rules of Civil Procedure solely upon the fortuitous timing of the Supreme Court's opinion in Randle v. Allen. Rather, failure to adhere to the time limits contained in the Rules amounts to a waiver of plaintiff's right to assert an attack based upon the number of peremptory challenges granted to the parties.

It is possible that reasonable judges would reach different conclusions on plaintiff's motion, however, "this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review." Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989). In matters reserved for the trial court's discretion, the issue is whether the trial court may "reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal." Pena, supra, at 937. Of course, as previously noted, the power of the appellate court's reviewing "lens" is weakest where, as here, the trial court's determination is at the "extreme end of the spectrum."

The Opinion of the Court of Appeals failed to address this untimely raising of the peremptory challenge issue. The raising of such issue in the trial court was beyond the 10 day time limit under Rule 59 and cannot be the basis of the appeal. This issue of timeliness and use of Rule 60(b) as the vehicle for assertion of the issue was not addressed by the Opinion of the Court of Appeals and entitles petitioners to a rehearing of this appeal.

POINT III

THE DETERMINATION OF ADVERSENESS BETWEEN THE DEFENDANTS WAS A FACTUAL DETERMINATION FOR THE TRIAL COURT

In its Opinion, the court notes that "different 'sides' exists for purposes of Rule 47(e) if there is a 'substantial controversy' between co-parties 'respecting the subject matter of this suit.'" Slip Opinion at 5. The court subsequently presents a lengthy hypothetical before concluding that "such a scenario may well warrant separate sets of peremptory challenges to defendants." Slip Opinion at footnote 4.

The court's statement of the law, coupled with its accompanying hypothetical, conclusively establishes that the determination of whether sufficient "adverseness" exists between the parties such as to warrant granting additional peremptory challenges *must be* a question of fact. The determination must be based on issues broader than the mechanical query of whether nominal defendants filed crossclaims. See, Sutton v. Otis Elevator, 68 Utah 85 (1926) (permitting peremptory challenges among multiple defendants although crossclaims were not filed). Instead, it is based on information gleaned from the entire proceedings and may include: (1) whether the parties employed the same attorneys; (2) whether separate answers were filed; (3) whether the parties interests were antagonistic. See, Carraro v. Wells Fargo Mtg. & Equity, 744 P.2d 915, 918 (New Mexico App. 1987), Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 768 (Texas App.-Corpus Christi 1986). In its order denying Plaintiff's Motion for Relief from Order Denying Plaintiff's Motion for a New Trial Pursuant to Rule 60(b), the court

explained, "that at the time of the hearing in chambers on the motion to limit peremptory challenges, the court made findings at that time that there was sufficient adversity between the various defendants (and) that each defendant was entitled to separate peremptory challenges." (See, Order attached hereto as Exhibit "A," R. 1036.2-1036.3.) Consequently, the trial court's determination of adversity between the parties, the basis for its award of four peremptory challenges to each of the named defendants, should not be disturbed unless "the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." Pena, *supra*, at 935, 936, (citations omitted).

The Opinion of the Court of Appeals failed to address this factual determination, the standard of review of such factual determination and why it was not in compliance with the Supreme Court decision in Randle.

POINT IV

THE COURT FAILED TO ADDRESS THE 14TH AMENDMENT ISSUE

Appellee, Pro-Tech, in its brief on appeal asserted that the Supreme Court in Sutton and in Randle were never presented with the issue of equal protection under the 14th Amendment.

In pertinent part, that provision provides,

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall deprive any person of life, liberty, or property without due process of law *nor deny to any person within its jurisdiction equal protection of the laws.* (Emphasis added.)

In issuing its Opinion, this court also overlooked and failed to address the fact that its interpretation of Rule 47(c) of the Utah Rules of Civil Procedure deprives the litigant of their right to equal protection under the 14th Amendment of the U.S. Constitution. As is more fully set out in appellee's brief, the court's application of Rule 47(c) effectively deprives some litigants of rights granted to other litigants in the same proceeding by providing certain parties only a share of peremptory challenges proportionate to the number of parties in the litigation, while allowing the opposing party its full number of peremptory challenges.

In this instance, the adversity and hostility between Smith and Pro-Tech mandated appointment of separate counsel under the Rules of Professional Responsibility. By requiring Smith and Pro-Tech to share peremptory challenges, the court's ruling nevertheless prohibits defendants from enjoying the same protections of the laws afforded to plaintiff.

POINT V

THE COURT FAILED TO ADDRESS THE DUE PROCESS ISSUE UNDER THE 5TH AMENDMENT

The court also overlooked the fact that the sharing of peremptory challenges potentially "puts it in the power of the plaintiff to deprive the real parties sought to be charged of the right to interpose even one peremptory challenge." Sutton v. Otis Elevator Co., 68 Utah 85, 143 (1926). To name a defendant in a suit, and then to deprive that defendants of the same right to challenge any of the jurors the plaintiff may exercise, is to deny due process to such defendant

including the right to effective assistance of counsel, in derogation of the 5th Amendment to the U.S. Constitution.

POINT VI

THE COURT FAILED TO ADDRESS THE ISSUES UNDER THE UTAH CONSTITUTION

The court also overlooked that the application of Rule 47(c) is unconstitutional under Article 1 § 24 of the Utah Constitution which provides "all laws of a general nature shall have uniform operation." As the operation of the law must be uniform, a law that is superficially uniform may still be unconstitutional. Lee v. Gaufin, 867 P.2d 572 (Utah 1993). In this instance, Rule 47(c) does not operate uniformly and is unconstitutional in that it treats defendants differently than plaintiff by allowing the plaintiff three peremptory challenges, yet requires defendants to share peremptory challenges. In issuing its Opinion, this court should consider the constitutional mandate as interpreted by the Utah Supreme Court in other contexts. See, Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah 1991) (holding that a law must apply equally to all persons within a class); Malen v. Lewis, 693 P.2d 661 (Utah 1984) (determining that the Utah automobile guest statute is unconstitutional under this section); Johnson v. Stoker, 685 P.2d 539 (Utah 1984) (holding that the Utah aircraft guest statute is unconstitutional under this section).

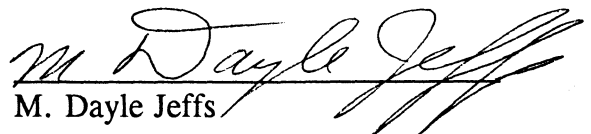
POINT VII

THE COURT FAILED TO ADDRESS THE ISSUES RAISED BY SHARED PEREMPTORY CHALLENGES

Finally, a strict rule requiring peremptory challenges to be shared would work injustice other than the federal and state constitutional violations. The court's interpretation overlooked the fact that the rights of either party, or of both parties, could be seriously jeopardized or entirely deprived in multi-party actions, if they cannot agree on peremptory challenges. For example, although in this instance plaintiff conceded that the rights of Pleasant Grove City were sufficiently disparate from the rights of Smith and Pro-Tech, the practical problem remains whether Smith or Pro-Tech receives all three peremptory challenges in the absence of an agreement between the parties or whether the rules require strict agreement among both parties before any of their peremptory challenges may be exercised.

WHEREFORE, appellee prays that a rehearing be granted and that on rehearing this court's Opinion dated December 21, 1995, be withdrawn and the court enter a new opinion affirming the judgment of the trial court.

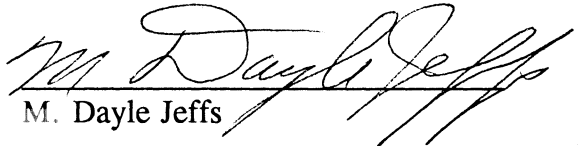
DATED and signed this 5th day of January, 1996.


M. Dayle Jeffs

CERTIFICATE

As counsel for appellee, I hereby certify that the foregoing Petition for Rehearing is not frivolous and is presented in good faith and not for delay.

DATED and signed this 4th day of January, 1996.


M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that the original and six copies of the Petition for Rehearing of Appelle Pro-Tech Restoration dba Stone Carpets were hand delivered to the Court of Appeals, 400 Midtwon Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies sent to the below named parties this 4th day of January, 1996, as follows:

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EXHIBIT "A"

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

SHIRLEY CARRIER

Plaintiff,

vs.

PRO-TECH RESTORATION dba STONE
CARPETS, WILLIAM ROGER SMITH, and
THE CITY OF PLEASANT GROVE,

Defendants.

ORDER

Civil No. 910400680

Judge Ray M. Harding

This matter came before the Court on the plaintiff's Motion for Relief from Order Denying Plaintiff's Motion for a New Trial Pursuant to Rule 60(B), Utah Rules of Civil Procedure and Motion for Expedited Hearing. The plaintiff was represented in the Court by Lynn C. Harris; defendant, Pro-Tech Restoration, was represented by M. Dayle Jeffs; defendant, William Roger Smith, was represented by Robert L. Moody; and the defendant, Pleasant Grove City, was represented by John M. Chipman.

The Court having reviewed the memorandums in support of the motion and in opposition thereto, having heard the oral arguments of counsel for the respective parties, and having been fully advised in the premises now makes and enters the following:

1036.2

ORDER

The Court noted that at the time of the hearing in chambers on the motion to limit peremptory challenges, the Court made findings at that time that there was sufficient adversity between the various defendants, that each defendant was entitled to separate peremptory challenges. Accordingly, the Court now,

DENIES the Motion for Relief from Order Denying Plaintiff's Motion for New Trial.

DATED AND SIGNED this ____ day of November, 1993.

Ray M. Harding